No. 90-854

In The

Supreme Court of the United States

October Term, 1990

DONALD J. DIESEN,

Petitioner-Cross-Respondent,

vs.

JOHN HESSBURG, THOMAS DALY, AND THE DULUTH NEWS-TRIBUNE,

Respondents-Cross-Petitioners.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS R. THIBODEAU,
Counsel of Record
JOSEPH J. ROBY, JR.
SALLY L. SJOGREN
JOHNSON, KILLEN, THIBODEAU & SEILER, P.A.
811 Norwest Center
Duluth, Minnesota 55802
(218) 722-6331
Counsel for Respondent-Cross-Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether petitioner-cross-respondent has shown a federal question as well as special and important reasons justifying review on writ of certiorari as required by Sup.Ct.R. 10.1.

PARTIES TO THE PROCEEDING

Respondent-cross-petitioner John Hessburg ("reporter") was formerly employed by respondent-cross-petitioner *Duluth News-Tribune* as a newspaper reporter. He now lives and works in Seattle, Washington.

Respondent-cross-petitioner Thomas Daly ("editor") was formerly employed by respondent-cross-petitioner *Duluth News-Tribune* as the newspaper's executive editor. He now lives and works in Napa, California.

Respondent-cross-petitioner *Duluth News-Tribune* ("newspaper") is a daily newspaper of general circulation serving, among other areas, northeastern Minnesota, including Carlton County, Minnesota.

Petitioner-cross-respondent Donald J. Diesen ("Mr. Diesen") was at the relevant time the duly elected County Attorney for Carlton County, Minnesota. He concedes he was a public official as that phrase is used in First Amendment libel law. Petition at ii. He currently lives and works as a private attorney in Carlton County, Minnesota.

RULE 29.1 STATEMENT

Respondent-cross-petitioner *Duluth News-Tribune* is a division of Northwest Publications, Inc. which is wholly owned by Knight-Ridder Newspapers, Inc.

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JURISDICTIONAL STATEMENT

As demonstrated in the main body of this brief this Court lacks jurisdiction due to the absence of a federal question.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

U.S. Const. amend. XIV, §1, provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Minn. Const. art. I, §3, provides that "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."

STATEMENT OF THE CASE

I. THE ARTICLES.

This action stems from three articles published in the newspaper's Sunday edition on November 15, 1981. At that time Mr. Diesen served as the elected County Attorney for Carlton County, Minnesota. The county is located about 20 miles south of Duluth, Minnesota, where the newspaper is published. The articles addressed the handling of battered women cases by the Carlton County law enforcement and judicial systems. The articles appear in this brief's appendix.

The first article cited critics of the Carlton County system who contended that battered women in the county faced a hard road to justice. A study of court records indicated that men who battered women seldom faced felony charges. The article noted that in most cases domestic assault charges were dismissed or assailants who pled guilty were placed on probation after receiving stayed sentences. The article concluded by describing specific cases which "raise serious questions about whether the county vigorously prosecutes and sentences men who batter women."

The second article examined the case of Kathy Berglund. Ms. Berglund was twice brutally attacked by her estranged husband, Melvin DeFoe. Despite the egregious circumstances Mr. DeFoe was not prosecuted for a felony nor was he sentenced to any time in jail. The article cited advocates for battered women, including Ms. Berglund's attorneys, who agreed that an injustice had been done to Ms. Berglund. It also presented the position of law enforcement and judicial officers with regard to the Berglund case. Both Mr. Diesen and the sentencing judge commented at length on their handling of the case. The Carlton County Sheriff, a supporter of Mr. Diesen, was quoted.

The third article focused on the county attorney, his record and his treatment of battered women cases. It began:

> Critics of Carlton County Attorney Donald Diesen contend he's an obstacle to justice for battered women.
>
> . . . .

> On the other hand, Diesen is seen by supporters – and even some hard line opponents – as scrupulously honest, a soft-spoken gentleman, a man who works hard and is not controlled by any special interests. Diesen's backers say he's fair minded and cares deeply about his work.

Sources favorable and unfavorable to Mr. Diesen were quoted in the article.

II. THE NEWS GATHERING ACTIVITY.

In the spring of 1981 the newspaper received a complaint that Carlton County did not prosecute men who battered women. The reporter assigned to the story, John Hessburg, met with advocates for battered women as well as women who had been battered. He then examined every Initial Complaint Report (ICR) on every assault of every kind in Carlton County. He spent 70% of his time on this phase of the investigation. He reduced the several thousand ICRs to 44 which involved domestic assault. He then developed flow charts which indicated the dispositions of these 44 cases. The reporter examined the county system in order to ascertain who had dealt with the women involved in those 44 cases.

Several interviewees had expressed concerns about the county attorney. The reporter therefore scheduled interviews with Mr. Diesen and his supporters. He kept his editors apprised daily about the information he gathered, and he frequently sought their counsel and advice. The editors closely supervised the reporter and reviewed the accuracy of his information. After the interview with Mr. Diesen the reporter interviewed other attorneys and sources, both favorable and unfavorable to Mr. Diesen,

and he returned to his original sources to double-check information.

The reporter obtained affidavits from the battered women he interviewed. He did this to be sure that the women realized the seriousness of what they were doing and to test their veracity and sincerity. The stories that could not be independently verified were not published. Contrary to Mr. Diesen's characterization, the newspaper never concluded that Jennifer Greensky's accusations were false. The Greensky story was not published because it could not be independently verified. It was a question of Ms. Greensky's word versus Mr. Diesen's word. It was never demonstrated that the accusation she made was false.

The editors independently confirmed the reporter's information prior to publishing the articles. Georgia Swing, city editor, visited the Carlton County courthouse on two occasions to look up the dispositions of files and to verify information used by the reporter for his story. On her second visit, Ms. Swing was accompanied by Dennis Buster, also a city editor. The two spoke to some of the people at the courthouse and examined files.

Ms. Swing found no discrepancies in the reporter's facts during either of her visits to Carlton. She found everything was accurate, and she so informed her superiors. Ms. Swing also edited the articles. She was looking for accuracy, and she made sure that all of the printed material was supported. Mr. Buster discussed the progress of the stories with the reporter on a daily basis. He traveled to the Carlton County Courthouse with Ms. Swing. He spent several hours listening to the tapes the

reporter made of interviews with witnesses. He reported to Larry Fortner, managing editor, that there were no inaccuracies between what was on the tape and what had been written by the reporter.

Mr. Fortner also reviewed much of the paperwork that was generated as the stories were prepared in addition to reviewing the stories themselves. Both Ms. Swing and Mr. Buster reported to Mr. Fortner that the information used in the articles had been double- and triple-checked, was accurate, and had been obtained in a responsible manner. Mr. Fortner testified that the articles contained only information that was available through the public records or which was attributed to some named person. Mr. Fortner testified that he had no doubt that the articles published were true.

Thomas Daly, executive editor of the News-Tribune in 1981, was apprised of the investigation from time to time. He testified that the newspaper did a thorough, complete job and that he had no doubt that everything printed was true. John McMillion, publisher of the newspaper at the time, testified that he knew of nothing false in the articles. He felt the articles were very fair and very balanced.

Nonetheless, because Mr. Diesen had written to the newspaper alleging unfairness by the reporter, the newspaper consulted its attorney prior to publishing the articles. The attorney, John Killen, testified that he reviewed the articles. He advised the newspaper that it is permissible to criticize public officials and that the articles were not libelous. He wrote a letter to the newspaper in which he concluded that though the articles raised a question as

to whether the county attorney was doing his job properly, this was not libelous.

Following publication of the articles, affidavits were obtained from twelve individuals who had contributed to the articles, including victims, attorneys, and those involved in the publication of the articles. The affiants stated that the statements attributed to them in the articles were accurate and were not published with malice or with reckless disregard for the truth.

III. THE TRIAL.

The newspaper presented testimony from the victims whose stories were told in the articles. Kathy Berglund dramatically and emotionally testified about the two assaults which she suffered at the hands of Melvin DeFoe. Her testimony agreed with the newspaper accounts. She testified that she wanted Mr. DeFoe prosecuted after the first assault. She stated that if Mr. Diesen had prosecuted Mr. DeFoe after this incident, she "would never have had to go through the second beating" and "probably wouldn't have the fear I have today."

After the second assault, Ms. Berglund and her advocates met with Mr. Diesen to try to get him to issue a felony charge. The sheriff also attended this meeting. Despite the savagery of the two attacks, Mr. DeFoe was not prosecuted for a felony. Ms. Berglund testified that she was not happy with the outcome of the cases. She also testified that her story was dealt with accurately in the articles.

Marjorie Wallin (now Millette), another victim, testified about her beating and kidnapping. Following the incident Ms. Millette contacted the police and filed a complaint. She testified that she repeatedly told Mr. Diesen that she wanted her husband prosecuted and that she was willing to testify. Nonetheless the charges against her husband were plea-bargained down to a misdemeanor by Mr. Diesen without her knowledge. Her husband received only one-year's probation. Ms. Millette testified that the articles dealt with her situation accurately.

Four paragraphs of the articles dealt with the "Chip" Martin case. Mr. Diesen contends that important facts were omitted from the description of this case. Petition at 3-4. However, he cites only one: The police officer's claim that his investigation established facts justifying no prosecution. The reporter testified that he never discussed the Martin case with the officer. The tape of the officer's interview made no mention of the Martin case.[1]

Battered women's advocates and attorneys quoted in the articles testified at trial. All said that they had been quoted accurately and that the articles fairly represented how Carlton County did or did not prosecute domestic abuse cases. The testimony of two advocates was based on their involvement with battered women and battered women's shelters in the area. Both were familiar with Ms.

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[1] Mr. Diesen alleges tampering with the tape recording of his own interview. Petition at 4. The sole basis for that allegation is Mr. Diesen's own speculation. Mr. Diesen never claimed to be an expert on tape recordings, and *no* expert evidence in this regard was ever presented.

Berglund's situation, as well as the claims made by others, including Ms. Greensky.

Supporters of Mr. Diesen were also quoted in the articles, including the sheriff, a police officer, an assistant county attorney, and a defense attorney. The supporters of Mr. Diesen who testified said that quotations attributed to them in the articles were fair and accurate.

IV. TRIAL PROCEEDINGS.

At the close of all the evidence the newspaper moved for a directed verdict. The trial court took the motion under advisement but said that if the jury ruled in favor of Mr. Diesen, "The court would be inclined to either grant a judgment notwithstanding the verdict in favor of the defendant, or . . . grant the motion that has now been requested by the defendant."

The trial court held as a matter of law that all statements in the articles were true and so instructed the jury. Mr. Diesen properly admits he "never challenged the trial court's ruling that the individual statements were true." Petition at 19. The jury ruled that the newspaper acted with reckless disregard as to the truth or falsity of the articles' alleged implication and awarded compensatory damages of $285,000 and punitive damages of $500,000. Petitioner's App. at 72A.

V. POST-TRIAL PROCEEDINGS.

The newspaper moved the trial court for judgment notwithstanding the verdict. The motion argued that as a matter of law Mr. Diesen should not have been allowed to

proceed under the implication theory and that it was error to instruct the jury and submit a special verdict form on that theory. The motion also argued that actual malice was not proved by clear and convincing evidence and that punitive damages should not have been allowed.

The trial court granted the newspaper's motion. Petitioner's App. at 62A. The trial court held that the libel by implication theory was not actionable and that the alleged implication was protected "criticism of a public official." Petitioner's App. at 64A-65A.

Mr. Diesen then appealed to the Minnesota Court of Appeals. A three-judge panel of the 15 member intermediate court, not a "unanimous Court of Appeals" as Mr. Diesen claims at page 7 of the petition, reversed and reinstated the jury's verdict. *Diesen v. Hessburg*, 437 N.W.2d 705, 712 (Minn.Ct.App. 1989). Petitioner's App. at 48A.

The newspaper sought and was granted further review of the intermediate appellate court's decision by the Minnesota Supreme Court. Petitioner's App. at 70A. The Minnesota Supreme Court's decision was filed on May 11, 1990. *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn. 1990). Petitioner's App. at 1A. The court of appeals was reversed and the trial court's grant of judgment notwithstanding the verdict was upheld.

Following the state supreme court decision, Mr. Diesen petitioned for rehearing. While that petition was pending this Court handed down its opinion in *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S.Ct. 2695 (1990). The Minnesota Supreme Court ordered informal briefs arguing the applicability of *Milkovich* "to the above-entitled matter." A1. Briefs were submitted by Mr. Diesen

and the newspaper. Mr. Diesen tries to minimize the state court's careful consideration of *Milkovich* by saying that the state court was "made aware" of the case. Petition at 11. Mr. Diesen made the Minnesota Supreme Court aware of the case with a 20 page, 8½ x 11 brief.

Notwithstanding *Milkovich* and the new briefs discussing that case, the Minnesota Supreme Court denied rehearing on August 29, 1990. Petitioner's App. at 71A.

Throughout his petition Mr. Diesen insinuates that the newspaper accepted the jury's defamation, falsity, actual malice and punitive damages findings. *See e.g.* petition at 6, 16 n. 6, 25 n. 8. Nothing could be further from the truth. When the trial court granted the newspaper judgment notwithstanding the verdict appeal by the newspaper from the verdict became moot. Mr. Diesen became the appellant.

At that stage of the proceedings no final order or judgment adverse to the newspaper had been entered on the jury's findings. Minnesota's appellate rules allow an appeal only from an order or judgment. Minn.R.Civ.App.P. 103.03. No appeal can be taken from an interstitial fact finding. *Id.; Johnson v. Am. Economy Ins. Co.*, 419 N.W.2d 126, 128, n. 1 (Minn.Ct.App. 1988); *cf. Walsh v. Kuechenmeister*, 196 Minn. 483, 492, 265 N.W. 340, 344 (1936) (an appellant must be "an 'aggrieved party,' and he cannot complain of errors that . . . did not operate to his disadvantage." [citation omitted]).

Nor could the newspaper obtain review of the jury's findings through a notice of review, the Minnesota equivalent of a cross-appeal. Minn.R.Civ.App.P. 106. Again,

that rule allows review only of an adverse "judgment or order." *Id.; Johnson v. Am. Economy Ins. Co., supra.* Thus the case went to the Minnesota Court of Appeals solely on Mr. Diesen's appeal. When the case reached the Minnesota Supreme Court the newspaper became the appellant and vigorously argued the jury's defamation, falsity, actual malice and punitive damages findings.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION DUE TO THE ABSENCE OF A FEDERAL QUESTION. THE STATE COURT DECIDED THE CASE ON ADEQUATE AND INDEPENDENT STATE COMMON LAW AND STATE CONSTITUTIONAL GROUNDS. MR. DIESEN HAS NO FEDERAL RIGHT TO PURSUE A LIBEL CLAIM.

The review sought by Mr. Diesen "is not a matter of right, but of judicial discretion." Sup.Ct.R. 10.1. This Court will not exercise that discretion unless "there are special and important reasons therefor." *Id.* Such reasons include an apparently erroneous decision by a federal Court of Appeals. Sup.Ct.R. 10.1(a). Since this case was never argued to a federal Court of Appeals the petition can be granted only if it satisfies some other jurisdictional basis.

All other certiorari jurisdiction rules and statutes require a federal question. Subpart .1(b) of this Court's rule 10 addresses federal questions decided by a state court of last resort. Subpart .1(c) addresses "an important question of federal law" and other federal questions decided by state courts or federal circuit courts. The

jurisdictional statute invoked by Mr. Diesen, 28 U.S.C. §1257(a), confers jurisdiction on this Court only when the state court decision implicates a federal statute, treaty, law, commission or authority, or implicates the federal Constitution. As the petitioner Mr. Diesen has the burden of establishing Supreme Court jurisdiction. *Durley v. Mayo*, 351 U.S. 277, 285 (1956), *reh'g denied*, 352 U.S. 859 (1956).

This Court strictly follows the federal question requirement in certiorari cases. In *N.Y. Times Co. v. Jascalevich*, 439 U.S. 1317, 1318 (1978), *reapplication denied*, 439 U.S. 1331 (1978), Mr. Justice White wrote:

> [I]t is only final judgments with respect to issues of federal law that provide the basis for our appellate jurisdiction with respect to state-court cases.

In *Herb v. Pitcairn*, 324 U.S. 117, 125-6, 128 (1945), this Court stated:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [citations omitted] . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. . . . It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law.

See also Mich. v. Long, 463 U.S. 1032, 1040-2 (1983).

A state court may decide a case on state law grounds even if the result would be different under federal law. In *Ill. v. Gates*, 462 U.S. 213, 222 (1983), *reh'g denied*, 463 U.S. 1237 (1983), this Court said:

> [W]e permit a state court, even if it agrees with the State [of Illinois] as a matter of federal law, to rest its decision on an adequate and independent state ground. Illinois, for example, adopted an exclusionary rule as early as 1923 [citation omitted], and might adhere to its view even if it thought we would conclude that the federal rule should be modified.

This Court "would not, of course, invalidate state law simply because we doubt its wisdom." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). In *Milkovich v. Lorain Journal Co., supra*, ___ U.S. at ___, 110 S.Ct. at 2698, n. 5, a case much cited by Mr. Diesen, this court acknowledged that the Ohio Supreme court was "free . . . to address all of the foregoing issues on remand" under Ohio law.

The issue here is: Did the Minnesota Supreme Court decide a federal question, or did the Minnesota Supreme Court rest its decision on adequate and independent state law grounds? As a matter of libel common law and by express declaration of the state court this case does not involve a federal question but instead was decided on adequate and independent state common law and state constitutional grounds.

1. **Libel Common Law In General.** The law of libel evolved through siegniorial, ecclesiastical and common law courts and arrived in our country as part of the common law of the several states. W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on The Law of*

Torts, §111 (5th ed. 1984). Libel law is a matter of "state interest," *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 341, and "recognized throughout the States" as a matter of "state law." *Farmers Educ. and Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 535 (1959). Libel is a "state-created tort action[ ]." *Curtis Publishing Co. v Butts*, 388 U.S. 130, 160 (1967), *reh'g denied*, 389 U.S. 889 (1967). "There is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Until 1964 state libel common law had no relationship whatsoever to federal substantive law. This Court then decided *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). There this Court held that the First and Fourteenth Amendments "delimit" state law in libel suits brought by public officials against newspapers. *Id.*, 376 U.S. at 264, 279-80, 283. That case did not create any new libel causes of action but instead placed a limit on previously available state law causes of action. For example, in *Milkovich v. Lorain Journal Co., supra*, ___ U.S. at ___, 110 S.Ct. at 2698, this court held that "the First Amendment does not prohibit the application of Ohio's libel laws to the alleged defamations." If Ohio had not recognized in the first instance Mr. Milkovich's cause of action that case never would have reached this Court.

Notwithstanding *N.Y. Times Co. v. Sullivan, supra*, and its progeny, in a libel case the underlying substantive claim remains a creature of state common law. If state common law does not recognize the libel theory of a plaintiff's case then neither the First Amendment nor any other federal issues need be addressed. They are moot.

Here the Minnesota Supreme Court correctly noted that Mr. Diesen was asking it "to recognize a legal theory . . . which is a question of law." *Diesen v. Hessburg, supra,* 455 N.W.2d at 449. Petitioner's App. at 5A. The state high court declined to do so under state common law. When the Minnesota Supreme Court said that "there was no defamatory 'speech' as a matter of law" and that Mr. Diesen's theory "is generally not actionable" it could only have been referring to claims actionable under Minnesota's common law. *Diesen v. Hessburg, supra,* 455 N.W.2d at 452. Petitioner's App. at 11A. Concurring Justice Simonett, citing Minnesota case law precedent, similarly held that "articulation of the defamatory implication is a question of law for the court to decide." *Diesen v. Hessburg, supra,* 455 N.W.2d at 455. Petitioner's App. at 44A.

The Minnesota court's holding lies uniquely within the domain of a state court. Federal courts

> . . . do not have the same power to reconsider interpretations of state law by state courts in which a decision has been rendered. The [state] Supreme Court had the power to reconsider and overrule its former interpretation, but the [federal] court below did not.

Moore v. Ill. Cent. R. Co., 312 U.S. 630, 633 (1941); *see also Erie R. Co. v. Tompkins, supra,* 304 U.S. at 78.

This Court cannot require the State of Minnesota to adopt the libel by implication theory as part of the state's common law. What other state and federal courts or the *Wall Street Journal* may say about the theory simply has no bearing on the common law of Minnesota. A ruling by

this Court would be nothing more than the kind of advisory opinion prohibited by *Herb v. Pitcairn, supra.* Without a state common law libel theory upon which to proceed federal questions are moot. Mr. Diesen has no separate federal right to assert a libel claim not recognized by state common law. *Erie R. Co. v. Tompkins, supra,* 304 U.S. at 78. These general principles of federalism and common law deprive this Court of jurisdiction.

2. Express Declaration By The State Court As To State Defamation Law. The Minnesota Supreme Court expressly held that its decision was based on state law, not federal law. *Diesen v. Hessburg, supra,* 455 N.W.2d at 452, Petitioner's App. at 10A. The state court first reviewed Minnesota law as to the truth, privilege and fair comment doctrines. *Diesen v. Hessburg, supra,* 455 N.W.2d at 452, Petitioner's App. at 10A, citing *Stuempges v. Parke, Davis & Co.,* 297 N.W.2d 252 (Minn. 1980), and *Lewis v. Equitable Life Assurance Soc'y,* 389 N.W.2d 876 (Minn. 1986). For example, decades before this Court decided *N.Y. Times Co. v. Sullivan, supra,* the Minnesota Supreme Court said a newspaper may:

> . . . denounce his [public official's] conduct as dishonorable. The methods by which a public officer continues to retain his hold on a public office are as much a matter of public concern, and as much subject to criticism, as the methods by which he originally obtained, or sought to obtain, the office. If he has resorted to a dishonorable trick, it is proper to publish the fact. Every one has a right to comment fairly, and with an honest purpose, on the conduct of public officials.

Wilcox v. Moore, 69 Minn. 49, 52, 71 N.W. 917, 918 (1897).

The state supreme court then extended state law to cases of alleged libel by implication brought by a public official against a newspaper. Minnesota's highest court updated state law and held:

> Thus, while first amendment and other policy considerations underlie this restraint, we note our decision here is rooted in state defamation law.

Diesen v. Hessburg, supra, 455 N.W.2d at 452. Petitioner's App. at 10A.

In addition to Minnesota's common law the state court decision rests upon Minnesota constitutional law. In its brief to the Minnesota Supreme Court the newspaper argued the applicability of Minn. Const. art. I, § 3, quoted above, which, similar to the First Amendment, guarantees "liberty of the press." The Minnesota Supreme Court:

> has long recognized that individual liberties under the state constitution may deserve greater protection than those under the broadly worded federal constitution.

State v. Hershberger, 462 N.W.2d 393, ___ (Minn. 1990). A state may interpret its own constitution so as to afford greater liberties than those afforded by the federal constitution. *Or. v. Hass,* 420 U.S. 714, 719 (1975). By deciding a case on state constitutional grounds a state court "immunizes its decision from review by this Court." *Payton v. N.Y.,* 445 U.S. 573, 600 (1980).

The Minnesota Supreme Court's express reference to state defamation law followed the advice of this Court given in *Mich. v. Long, supra.* There this court advised state courts on how to indicate whether a decision is based on state or federal law:

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision.

Mich. v. Long, supra, 463 U.S. at 1041. The Minnesota Supreme Court made exactly this kind of plain statement.

Mr. Diesen in his first "Question Presented" and elsewhere mischaracterizes the holding of the Minnesota Supreme Court. Contrary to Mr. Diesen's assertion the state court never held that his claim was "precluded by the First Amendment" or federal "constitutional concerns." Petition at i, 21. Nor did the state court create "a separate standard of falsity for public officials" based on federal law as Mr. Diesen claims. Petition at 10. Mr. Diesen improperly attempts to deflect this Court's attention from the state court's crucial holding that "our decision here is rooted in state defamation law." *Diesen v. Hessburg, supra,* 455 N.W.2d at 452. Petitioner's App. at 10A. Mr. Diesen relegates this dispositive jurisdictional holding to a mere footnote. Petition at 10.

As a matter of state common law and state constitutional law, and as a matter of express pronouncement by the Minnesota Supreme Court, the case before this Court presents no federal question. To the contrary, the case

was decided upon adequate and independent state common law and constitutional grounds which forestall federal appellate review even if federal law would produce a different result. In addition Mr. Diesen has no separate federal right to pursue a libel claim. This Court lacks jurisdiction and the petition must be denied.

II. ASSUMING WITHOUT ADMITTING THAT THIS COURT HAS JURISDICTION TO REVIEW THIS CASE, IN LIGHT OF THE STATE COURT'S ACTUAL MALICE HOLDING THERE ARE NO SPECIAL AND IMPORTANT REASONS JUSTIFYING FURTHER REVIEW BY THIS COURT.

In libel cases brought by public officials the Constitution requires a unique and comprehensive scope of review on appeal.

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984), *reh'g denied*, 467 U.S. 1267 (1984). *See also Harte-Hanks Communications, Inc. v. Connaughton*, ___ U.S. ___, ___, 109 S.Ct. 2678, 2694-5 (1989) (actual malice is a question of law).

The Minnesota Supreme Court recognized its constitutional duty independently to review the record for

proof of actual malice. *Diesen v. Hessburg, supra,* 455 N.W.2d at 452-3. Petitioner's App. at 11A-13A. After analyzing Mr. Diesen's contentions and various precedents the state court held:

> There was no evidence the Newspaper doubted the accuracy of the published articles. To the contrary, quotations and documents were rechecked, interviews and notes were reviewed, statements often were presented with cautionary language, and stories that could not be independently verified were not used. Journalism Professor Holsinger testified no journalism standards were violated . . . [A]ctual malice was not established here as a matter of law.

Diesen v. Hessburg, supra, 455 N.W.2d at 453-4. Petitioner's App. at 13A-14A. Concurring Justice Coyne added:

> I concur in the result reached by the majority because I do not find reckless disregard for the truth amounting to actual malice in the constitutional sense.

Diesen v. Hessburg, supra, 455 N.W.2d at 456. Petitioner's App. at 47A.

Actual malice of course was an indispensable element of Mr. Diesen's case. *N.Y. Times Co. v. Sullivan, supra,* 376 U.S. at 283. He failed to prove it by clear and convincing evidence. For that reason alone he could not prevail in this case even if the state court erred in its analysis of the libel by implication theory. Again, a ruling by this Court on the implication theory would be nothing more than the kind of advisory opinion prohibited by *Herb v. Pitcairn, supra.*

Mr. Diesen's only attack on the state court's actual malice holding appears at pages 24-6 of the petition. He

alleges that the state court "erred by refusing to consider evidence of common law malice" when evaluating actual malice. Innumerable factors prove or disprove actual malice. The Minnesota Supreme Court discussed many of them. *Diesen v. Hessburg, supra,* 455 N.W.2d at 452-4. Petitioner's App. at 11A-14A. To single out alleged error in the evaluation of one factor simply does not present "special and important" reasons for granting the writ. Sup.Ct.R. 10.1.

In any event the state court correctly evaluated common law malice. It pointed out that actual malice is sometimes confused with common law malice. *Diesen v. Hessburg, supra,* 455 N.W.2d at 453, Petitioner's App. at 12A, citing *Harte-Hanks Communications, Inc. v. Connaughton, supra.* It then said that ill will is "irrelevant" when proving knowledge of falsity or reckless disregard for the truth. *Id.* The state court was responding to and rejecting Mr. Diesen's claim that the reporter's alleged ill will, improper motive and adversarial stance proved malice in the constitutional sense. It is hardly fair of Mr. Diesen to accuse the state court of "ignoring" common law malice. Petition at 26.

The Minnesota Supreme Court correctly followed the instructions of this Court given in *Harte-Hanks Communications, Inc. v. Connaughton, supra,* ___ U.S. at ___, 109 S.Ct. at 2685, n. 7:

> It also is worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term. . . . The phrase "actual malice" is unfortunately confusing in that it has nothing to do with bad motive or ill will.

Regardless of the reporter's alleged ill will, the plain constitutional fact remains: "There was no evidence the Newspaper doubted the accuracy of the published articles." *Diesen v. Hessburg, supra,* 455 N.W.2d at 453. Petitioner's App. at 13A.

The Minnesota Supreme Court correctly evaluated actual malice. Mr. Diesen's reference to common law malice falls far short of showing that the state court erred. In light of the actual malice holding there are no special and important reasons justifying further review by this Court.

III. ASSUMING WITHOUT ADMITTING THAT THIS COURT HAS JURISDICTION TO REVIEW THIS CASE, THE MINNESOTA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN *MILKOVICH V. LORAIN JOURNAL CO.* THUS OBVIATING ANY NEED FOR FURTHER REVIEW BY THIS COURT.

In *Milkovich v. Lorain Journal Co., supra,* ___ U.S. at ___, 110 S.Ct. at 2705, this Court rejected a "wholesale defamation exemption for anything that might be labeled 'opinion'." However this Court still requires that the statement be "provable as false," "contain a provably false factual connotation" or can be "reasonably . . . interpreted as stating actual facts." *Id.,* ___ U.S. at ___, 110 S.Ct. at 2706. Any alleged connotation must be "sufficiently factual to be susceptible of being proved true or false." *Id.,* ___ U.S. at ___, 110 S.Ct. at 2707. A plaintiff must show a "core of objective evidence." *Id.*

Although the Minnesota Supreme Court cited pre-*Milkovich* law, as it turned out the state court applied

what was to be the *Milkovich* holding. The state court looked to the statements' "specificity and verifiability." *Diesen v. Hessburg, supra,* 455 N.W.2d at 451. Petitioner's App. at 8A. These criteria match this Court's references to objective and provable falsity. The state court then held that the "allegedly false implication here arguably was unspecific and unverifiable." *Id.* That is to say, Mr. Diesen failed to prove a false statement as required by *Milkovich* and *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777 (1986). Similarly, concurring Justice Simonett held that the alleged implication was "not provable one way or the other" and that it was "not . . . proven to be false." *Diesen v. Hessburg, supra,* 455 N.W.2d at 456. Petitioner's App. at 46A-47A.

The state court ordered and received briefs analyzing *Milkovich* in connection with Mr. Diesen's petition for rehearing. Rehearing was nonetheless denied because *Milkovich* does not change the result here or, more likely, *Milkovich* does not alter state law in which the decision was rooted.

Mr. Diesen's case suffered not from a fact vs. opinion defect, but instead from his failure to define a provably false implication from the articles. Articulation of the articles' implication is a question of state defamation law for decision by the trial court, not a question of fact. In *Utecht v. Shopko Dept. Store,* 324 N.W.2d 652, 653 (Minn. 1982), the Minnesota Supreme Court held:

> The question whether a claimed defamatory innuendo is reasonably conveyed by the language used is for the court to determine.

And in *Marudas v. Odegard,* 215 Minn. 357, 358-9, 10 N.W.2d 233, 234 (1943), the state supreme court held:

> It is for the court to determine whether the construction of the language put forward by the innuendo is permissible.

In granting the newspaper judgment notwithstanding the verdict the trial court held:

> Neither party here has provided a satisfactory articulation of the allegedly defamatory implication emanating from defendants' three articles. . . . [T]he implication is one of vague derogation of plaintiff in his official capacity.

Petitioner's App. at 65A. Concurring Minnesota Supreme Court Justice Simonett agreed. *Diesen v. Hessburg, supra,* 455 N.W.2d at 455, Petitioner's App. at 44A ("The implication is that Diesen . . . was a poor prosecutor.").

Mr. Diesen took no appeal from the trial court's articulation of the articles' implication. That ruling became the law of the case. To this day however Mr. Diesen stubbornly and wrongly characterizes the implication as a question of fact. *See e.g.* petition at 15, n. 5. Mr. Diesen failed as a matter of Minnesota law to convince the trial court of his version of the implication, misfeasance or malfeasance in office.

The trial court's unreviewable articulation of the implication simply cannot be proved either true or false under the *Milkovich* rule, whether the implication is fact, opinion or a hybrid of both. The *Milkovich* holding does not change the result of this case, and *Milkovich* does not present special and important reasons for further review of this case.

CONCLUSION

This court lacks jurisdiction due to the absence of a federal question. The state court decided the case on adequate and independent state law grounds. Mr. Diesen has no federal right to pursue a libel claim. Even if this court had jurisdiction the state court's actual malice holding obviates any need for further review. Nor does this Court's holding in *Milkovich v. Lorain Journal Co.* change the result in this case.

Mr. Diesen has failed to show a federal question as well as special and important reasons justifying review on writ of certiorari as required by Sup.Ct.R. 10.1. The petition must be denied.

Dated: December 26, 1990

Respectfully submitted,

THOMAS R. THIBODEAU
Counsel of Record
JOSEPH J. ROBY, JR.
SALLY L. SJOGREN
JOHNSON, KILLEN, THIBODEAU
& SEILER, P.A.
811 Norwest Center
Duluth, Minnesota 55802
(218) 722-6331
Counsel for Respondents-Cross-Petitioners

STATE OF MINNESOTA
IN SUPREME COURT
C2-88-1345

Donald J. Diesen,

Respondent,

vs.

John Hessburg, et al., petitioners,

Appellants.

ORDER

WHEREAS, the United States Supreme Court has issued its decision in *Milkovich v. Lorain Journal Co.*, ___ U.S. ___ (filed June 21, 1990);

IT IS HEREBY ORDERED that the parties shall serve and file informal letter briefs not exceeding 20 pages addressing the applicability of *Milkovich* to the above-entitled matter. Said briefs shall be served and filed simultaneously on or before August 3, 1990.

Dated:

7-13-90

BY THE COURT:

OFFICE OF
APPELLATE COURTS

/s/ Peter S. Popovich
Chief Justice

JUL 13, 1990
FILED

Duluth News-Tribune

SUNDAY 75¢

Our 112th year - No. 294 Duluth, Minnesota Sunday, November 15, 1981

Is justice denied battered women in Carlton County?

On Page 10: The case of Kathy Berglund, Carlton County attorney criticized.

By John Hessberg

CARLTON – Battered women in Carlton County face a hard road to justice, critics of the system contend.

Men who batter women seldom face felony charges in court and seldom go to jail for their offenses, a study of county court records shows.

If the assailants are charged with felonies, those charges generally are plea-bargained down to misdemeanors.

Assailants charged with misdemeanor assault seldom are sentenced to jail.

In most cases, domestic assault charges either are dismissed or assailants who plead guilty are placed on probation after receiving stayed sentences.

These generalizations have been verified by an investigation of Carlton County records spanning thousands of documents and cases that ranged from Jan. 1, 1978, through July 1981.

Among items examined were initial complaint reports recorded by dispatchers, followup investigations by the Cloquet Police Department and the Carlton County Sheriff's Department and disposition records of District and County court cases.

Forty-four domestic assault cases were examined: eight from Cloquet, 21 in the county from 1978 through 1980 and 15 from the county in 1981. About 18 county cases between 1978 and 1980 were not examined because of problems in finding some files.

"Violence is a serious matter and jail is an appropriate type of response for people who do violence – whether violence in the family or violence in general,"

said Carlton County Attorney Donald Diesen. "The individual case has to be analyzed. Violence is something that should not be tolerated by society and calls for some severe responses."

But that's not reflected in the record.

In only three of the 44 cases were assailants charged with felonies. In all three cases the felonies were plea-bargained down to misdemeanors. In two of these attacks the assailants used knives; in the third the attacker bound and gagged his estranged wife and allegedly abducted her to Wiscon-

See **Justice** Page 2A

From Page 1A

sin.

Six of the assailants got jail time (one man got only one day); 18 got probation; 13 cases were dismissed; one is still pending. Six were handled in other ways such as mental commitments, fines, deferred prosecution or restraining orders, or they still await judicial action.

Court files show typical reasons for dismissal: The prosecutor and defense agree to a plea bargain, dropping or reducing some of the charges in exchange for a guilty plea; the victim drops charges; the victim becomes an unwilling witness; the prosecutor decides there's no case.

"The court systems over there are enabling men to be violent by not prosecuting them," said LuAnn Dietrich, advocate at the Women's Shelter in Duluth, which has helped a number of Carlton County's battered women.

Joyce Thornton, director of Project HOPE in Cloquet, an advocacy group for abused women, said, "The people we've had are hesitant to go through the court system" in Carlton County, because they're leery of paperwork hassles and the county's reputation for weak prosecution of battering men.

Diesen said, "I can see that these battered women's shelter and women's coalition . . . groups must be very

frustrated. We're also very frustrated. The courts are frustrated. How do we handle this?"

THE JUDGES COMMENT

County Judge Ladean Overlie and Judicial Officer Dale Wolf, an acting county judge, said they've failed to send some domestic assailants to jail who probably should have gone there.

Overlie Wolf

Overlie said, "We just aren't sending them to jail in each and every case. "Granted, I err numerous times; we're human. But there's such a thing as just error. I'm not that smart of a judge, but I'm the most open in Northeastern Minnesota. I stand on my record and put my record up against any judge in the state, the area."

Wolf said, "I hope neither one of us is biased against women. We're just human beings. I wish we had the magic to do a perfect job. We're just part of a system that's not a perfect system."

Overlie, 61, has been county judge for 17 years and was a municipal court judge for 13 years before that. Wolf, 34, is starting his fourth year as judicial officer.

"In overwhelming numbers of (domestic abuse cases) there is chemical abuse," said Overlie. "So, obviously, we're interested in what the family wants us to do. Do they want us to come down as heavy as we can or do we reunite the family?"

JUSTICE: IS IT DENIED BATTERED WOMEN IN CARLTON COUNTY?

Wolf asked, "What's your end goal, to try to reduce the amount of battering of women? We can't undo the

battery. We can't make it up to the lady. Hopefully, what we can do is prevent future things." Therefore, Wolf said, marriage counseling or alcohol treatment often are ordered as conditions of probation.

"I don't want to see one woman battered one little bit," said Overlie. "But I just can't swallow hook, line and sinker" the demands of every special-interest group such as womens' advocates. Advocates assume jail is the answer for everything, he said.

Addressing the advocates, Wolf said, "If you really get too paranoid that the whole system is against you" that can hurt a good cause.

Overlie and Wolf cited three main reasons they most often opt against jail or fines for domestic assailants:

'I can see that these battered womens' shelter and womens' coalition . . . groups must be very frustrated. The courts are frustrated. How do we handle this?'

Donald Diesen,
County attorney

- For most of 1978 through 1980 Carlton County had no jail of its own.
- Fines may exacerbate family friction by putting the spouses in financial trouble.
- Jail terms may aggravate family problems by removing the breadwinner or by fueling hard feelings between spouses.

During the time Carlton County had no jail – about March 1978 through mid-December 1980 – prisoners were shipped to nearby county jails to await hearings or serve

time. That was costly for the county and time-consuming for deputies, Wolf said. At times, the court system had to make appointments for jail time several months in advance with neighboring counties, Wolf said.

"I'll admit there's people I'd have liked to send to jail – if I had a jail," said Wolf.

Wolf's words notwithstanding, court records show no change in sentencing policy after the new jail opened on Dec. 17, 1980.

From January through July of 1981, there were 15 cases of men charged with assault or disorderly conduct after allegedly beating women. (One man was charged two different times.) Seven of the 15 charged either pleaded guilty or agreed to a plea bargain. Two of those men received jail terms: One got 30 days, the other got one day plus a year's probation. Another got 10 days in jail but was given credit for time already served and was freed.

Furthermore, jail officials in three neighboring counties contradict the judges' claim that jails in the area frequently were full from 1978 through 1980.

During the time Carlton County had no jail, the closest one that could accept long-term prisoners was the St. Louis County Jail in Duluth, about 20 miles away. Sheriffs of the two counties had an agreement that Carlton County's long-term prisoners could be housed in Duluth when necessary. That agreement was in effect through August 1980.

"There's always room at the St. Louis County Jail; there has to be," said Jail Administrator Bob Higby. "When you run out of room you make do with what you've got. You just throw another mattress on the floor. If there's something out there that's a detriment to the public . . . there's always room at the county jail."

Since 1923, the total capacity of the St. Louis County Jail has been 136. According to Higby's records, the average daily populations there for the three years Carlton

County had no jail were 89 3 in 1978, 87.9 in 1979 and 106.7 in 1980. Those numbers didn't fluctuate more than 15 prisoners most days of those years, Higby said.

The State Department of Corrections defines a "comfortable capacity" in a jail as 80 percent occupancy (108), Higby said. With the exception of a few two-or three-week periods, the St. Louis County Jail occupancy was well below that 80 percent mark in 1978 and 1979, and "at or close" to that level through 1980, Higby said.

Another jail near Carlton County that accepts long-term prisoners is in Aitkin, 58 miles away. Aitkin County Sheriff Bill Sobey said, "The only time that jail has ever been full has been six or seven years ago. I always have some beds. We never fill them up complete. I always tried to have a bunk or two open so I wouldn't have to turn anybody down." However, Sobey said, from 1978 through 1980 there were some times when it would have strained his capacity to take more prisoners.

A third nearby jail is Crow Wing County's in Brainerd. Crow Wing County Sheriff Chuck Warnberg said he was shipping prisoners out in 1978 and 1979. But since his new jail was opened Feb. 1, 1980, he said, about 65 percent of the days he would have accepted long-term prisoners from Carlton County. On family relationship, Overlie said: "One of the worst things you can do if a couple wants to get together, reconcile and get the family restored is to give a jail sentence."

Said Wolf: "They come out much more sour. He may go over there fuming about that rotton dirty SOB of a gal and come out more dangerous than ever." It's sometimes "a safer route" to give a domestic assailant a stayed sentence, probation and treatment than to jail him, Wolf said.

"Send him to jail for 15 days, let him boil in there and go beat her up again?" asked Diesen's Assistant County Attorney Art Albertson.

"Pure economics" is another reason the judges don't send many domestic assailants to jail, Wolf said. "A women who is dependent on the husband as the bread-winner . . . as soon as the swelling goes down, the reality (sets in). Pretty soon she'll forgive him and try over again."

"You are taking grub off the table, which is going to incite them further," said Overlie.

Dennis Seitz, rural Mahtowa resident and Cloquet attorney with expertise in domestic cases, said, "I'm more upset by the fact the sentencing has been apparently inappropriate. Probably, the courts should sentence more harshly" when a woman pushes her case all the way through the system.

Of the system's officials, Seitz said, "We do have an unbelievable tolerance for violence in our society. Our officials are elected to reflect our community feelings, do our bidding and we get what we deserve."

PEACE OFFICERS 'SENSITIVE'

While the system has flaws, Cloquet police and the Carlton County Sheriff's Department are bright spots for battered women, said Barb Loney, assistant director of Project HOPE. "They are with us and they are pushing for change. They're very sensitive. They are very willing to help. I couldn't be happier." Said Cloquet Police Sgt. Dennis Randelin, " I kind of run hot and cold with the system."

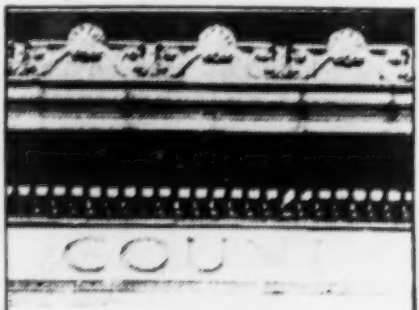
Randelin

Randelin said there are many forces that work against jail terms for domestic assailants, even when peace officers push hard for conviction. Often, the woman changes her mind and drops charges; sometimes, chemical dependency counselors or social workers apply pressure not to jail a man.

Added Randelin: "Or the minister will say, 'Gee whiz, haven't you heard of forgiveness?'

"Women who are really being straight and honest, who want to be protected and are willing to stand by us . . . I think the system takes care of them very well," Randelin said.

Carlton County Sheriff Terry Twomey declared, "I don't think the criminal justice system – period – serves the needs of battered women." Twomey said those women are scared and want immediate, lasting protection. Often, their assailants are hard to track down or post bail quickly and are free to harass them again. It isn't fair to zero in just on Carlton County – other counties have the same problems, Twomey said.



'There's always room at the St. Louis County Jail. If there's something out there that's a detriment to the public . . . there's always room at the county jail.'

Bob Higby,
jail administrator

SERIOUS QUESTIONS RAISED

Several cases that raise serious questions about whether the county vigorously prosecutes and sentences men who batter women surfaced after inspection of the county's law enforcement and court files:

• Henry Wallin's wife, Marjorie, who was in the process of a divorce, alleged that on Sept. 4, 1979, Wallin forced his way into her Cloquet mobile home and beat her in the face with his fists. Then Wallin stuffed her

mouth with paper towels, tying the wad in with baling twine, and bound her hands behind her back, she charged. Wallin drove his wife to his Foxboro, Wis., residence, she alleged, then returned her three hours later.

The Cloquet police officer who investigated her complaint, observed bruises on her cheek and chin. Wallin was charged with false imprisonment, a felony, and misdemeanor assault.

County Attorney Donald Diesen dismissed the felony charge on Nov. 14, 1979, and Wallin pleaded guilty to simple assault. The next day, County Judge Ladean Overlie stayed execution of a 90-day jail term, and gave Wallin one year probation, with the condition he not harass Marjorie at all during that time.

"The jail sentence was hanging over him, which we felt would be adequate," Diesen said.

Overlie said it might have been appropriate to give Wallin a stiffer sentence.

Wolf said one reason Wallin was not sentenced to jail was that he had a herd of milk cows in Wisconsin that might have been harmed had he left them unattended.

• Kenneth K. Clark's wife, Betty, Cloquet, alleged that on Sept. 24, 1979, he beat her and smashed some items in her apartment. The Cloquet Police Department's report contained a color photo of the victim. She suffered a large gash on her left temple plus many scratches and bruises on her face.

Randelin said she had reported one previous domestic assault by Clark, where he allegedly had beaten her with a pair of boots. She dropped charges on that one.

For the Sept. 24 incident, Clark was charged with misdemeanor assault and domestic abuse. Before Wolf he pleaded guilty and was sentenced to 10 days in jail plus a $200 fine. Wolf stayed that sentence for 30 days on the condition Clark contact the county's Human Services Department for marriage counseling.

Overlie said he believes probation violators should be treated "more severely" than first-time domestic assailants. "You should give them close to the maximum (sentence) when there's a violation," Overlie said.

Clark's file shows he never reported for counseling as ordered. He therefore violated his probation and was in contempt of court. The justice system did nothing to punish that contempt, the file reveals.

A memo dated April 29, 1980, placed in Clark's file by a court clerk and addressed to Wolf, stated: "Dale – Do you suppose we should request this person to appear in court? Apparently he never went for marriage counseling. J."

Wolf's written reply was: "No – file, and if he comes in again with similar problem we will proceed on this followup. D.A.W."

Why did Wolf not order Clark to be brought in for contempt after the clerk told him Clark defied his sentence?

"It wasn't brought to my attention for a long time," Wolf said. "I can't really monitor everything, either." Because there were no more domestic" flare-

See **Justice** next page

Justice

From preceding page

ups" reported after Clark was given probation. "I just felt I wasn't going to press the issue," Wolf said. "If he does come in again . . . he probably would be going to jail."

• On June 13, 1981, Howard "Chip" Martin of Cloquet allegedly stabbed his wife, Eleanor, with a knife after beating her and declaring he was going to kill her, said Randelin in a report.

On June 26, Martin was charged with second-degree assault – a felony. The June 13 assault occurred while Martin was still on one year's probation for a Feb. 6,

1981, disorderly conduct conviction, stemming from an incident in which a Cloquet police officer saw him grab Eleanor's neck with his arm while the couple argued.

Juvenile Probation Officer Nadine King recommended against supervised release for Martin, noting he had five prior felony convictions.

The county attorney's office arranged a plea bargain on Aug. 5, reducing the felony to misdemeanor assault. Martin pleaded guilty. District Judge Charles Barnes sentenced Martin to 10 days in jail. Martin already had served that much time awaiting hearings, so the judge set him free.

• On June 15, 1980, Donald G. DeFoe, Cloquet, allegedly threatened to kill Sylvia Smith of Sawyer, then struck her in the throat and knocked her to the ground, she told Deputy Tim Lamminen. While she lay on the ground DeFoe kicked her in the stomach, pulled her hair and struck her in the head, she alleged.

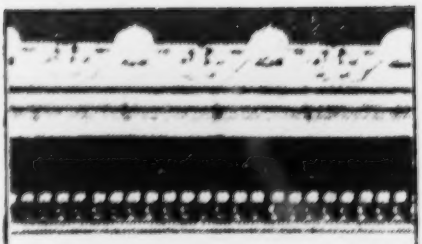
Yet DeFoe was charged with two misdemeanors in connection with Smith's complaint: trespassing and fourth-degree assault. On Sept. 17, 1980, he pleaded guilty and Judge Overlie stayed a 30-day jail sentence, giving DeFoe a year's probation.

On June 17, 1981, while DeFoe was still on probation for the Smith assault, Dorothy Yadon of Cloquet told authorities that DeFoe had beat her. She told Probation Agent Mark Zuber that she and DeFoe had been at his mother's house in Fond du Lac Homes, rural Cloquet, on May 20, 1981, when they had got into an argument.

Yadon told Zuber: "He threw me on the highway on Big Lake Road and he proceeded to beat me." She said he looked for a gun but couldn't find one, "so he grabbed a knife and I ran for the swamp where I laid for half an hour because he was looking for me." She later flagged a friend's car down and was driven to safety, she told Zuber.

Both Yadon and DeFoe failed to appear at an Aug. 18, 1981, probation violation hearing, the court file shows.

Overlie ordered an arrest warrant for DeFoe that day. A hearing was held Oct. 1 but was continued to another date not yet scheduled.



'The court systems over there are enabling men to be violent by not prosecuting them.'

LuAnn Dietrich, women's advocate

PROSECUTION PROBLEMS

• The prospect of having husband and wife accusing each other under oath and of calling children to testify "which parent is lying" forces us to proceed cautiously, Diesen said. Sometimes after a domestic assault, "the family dynamics that can come bursting forth the next day throw the whole (prosecution case) into a cocked hat." Family members may intervene and convince the woman to drop charges; ministers and friends may get involved; apologies may flow and some woman may be quick to forgive.

• The Minnesota Supreme Court suggests prosecutors should be "cautious in blasting into family situations," Diesen said. Where civil remedies are available, they should be considered, he said.

• Because many domestic assaults that reach trial stage involve conflicts in basic one-on-one testimony, "we've got to assess the probability of a conviction," Albertson said. "Juries, in my best estimation, are reluctant to insert themselves into family situations."

• When investigative reports show a domestic assailant has a severe mental or chemical abuse problem, a prosecutor may consider a non-jail remedy for his

behavior, Diesen said, such a commitment to a state institution.

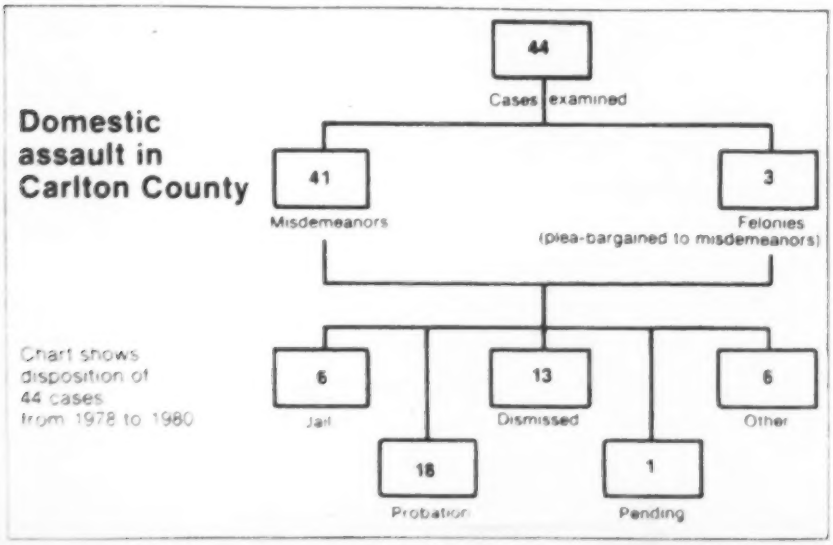
• Then there's the problem of the vascillating witness, some law officers and the prosecutors said. Sometimes a women will call police the day after an assault, having made up with her assailant; and even if she was injured she'll want to drop charges. It's tough to prosecute when the victim is an unwilling witness, Albertson observed.

Following are facts about the Carlton County Court system that are relevant to case flow.

• Diesen had only one assistant, Albertson, from Oct. 1, 1977, until July 20, 1981, when he hired Scott Belfry.

• All misdemeanor prosecution for Cloquet is handled by the city attorney. All Cloquet felonies are handled by the county attorney. Misdemeanors and felonies from the county at large are prosecuted by the Carlton County attorney's office.

• The number of reported domestic assaults is probably less than the total number that actually occurred in Carlton County in a given year. Police and prosecutors agree many women never report assaults by their husbands or boyfriends simply to avoid a social stigma they feel will follow. The News-Tribune study seems to indicate, however, that the number of reported cases has climbed steadily since 1978.



focus/editorial
Duluth News-Tribune

Unpaid U.S. debts

Sunday, Nov. 15, 1981

D

Justice denied?

The case of Kathy Berglund

Editor's note: Kathy Berglund has married since the events of this story took place and has taken a new surname. However, her experience with the Carlton County legal system occurred before her marriage, so we have used her maiden name, Berglund.

BY JOHN HESSBURG

CARLTON – The man hammered Kathy Berglund's face with his fists and slammed her head through a sheetrock wall. Pinning her arms under his knees, he traced a knife across her throat. He told her she was going to die.

That was Dec. 7, 1979.

Berglund, 33, still feels a rush in her ears as she recounts how Melvin Lester DeFoe beat her during several hours in a jealous rage over her boyfriend.

Berglund, of Cloquet, says DeFoe, father of her three children, also tore through her house, causing considerable damage. And she charges that nine months later, on Labor Day 1980, DeFoe, 41, again attacked her, causing her to break her jaw.

Assaults that involve dangerous weapons or that break bones are felonies under Minnesota law. But DeFoe never stood trial on felony charges, nor was he sentenced to a day in jail, according to court files.

"I feel a great injustice has been done to me," Berglund says. "They bungled the whole thing."

Berglund's story illustrates serious questions about the way Carlton County's legal system prosecutes men who batter women, critics of the system say.

On Dec. 7, 1979, DeFoe burst into her home, Berglund said in a complaint to Carlton County deputies.

He forced her boyfriend to leave, she said, and then beat her, intermittently, for hours.

Shortly before deputies arrived, she said, DeFoe knelt over her on a sofa bed and drew a knife blade across her throat, threatening to kill her. Her son, Todd, then 10, told Carlton County Sheriff Terry Twomey he witnessed the knife attack and much of the beating. DeFoe later pleaded guilty to assaulting Berglund on Dec. 7.

But her story doesn't end there.

Late the night of Sept. 1, 1980, Berglund drove home from a bar and found DeFoe's truck parked in her driveway. She said he hollered something and started after her. He chased her toward the house and tackled her, she said, causing her to break her jaw when she fell on some rocks.

Berglund said she half-ran, half-crawled into her house, with DeFoe not far behind. She said her boyfriend and three children were in the house and saw DeFoe kick her while she lay on the floor.

"The reason, I'm sure, I got my jaw broken was because Melvin wasn't prosecuted the first time," Berglund said. "He doesn't fear the law."

Twomey said DeFoe should have faced felony charges in connection with both assaults.

Contacted twice by telephone, DeFoe refused comment.

BERGLUND: SYSTEM FAILED

Following are some of the points Berglund makes against the Carlton County legal system:

Despite reports by three investigators – including Twomey – of the Dec. 7 assault and damage spree, plus a doctor's verification of wounds and bruises, Berglund's attorney, Thomas Bieter, Duluth, said he had to pressure Carlton County Attorney Donald Diesen into charging DeFoe with two felonies – second-degree assault and

aggravated criminal damage to property. Diesen denies that.

On Feb. 6, 1980, Diesen – without consulting Berglund or Bieter, they said – devised a plea bargain for DeFoe. He dismissed the felonies and DeFoe pleaded guilty to misdemeanor assault.

"I was just flabbergasted when I found out he had gone to court and gotten sentenced," Berglund said. "I wanted to be there to testify. I was very willing."

Said Twomey. "Yes, I agreed with (Berglund) and I still agree that she really probably did not have her day in court. The plea bargain was accepted and certainly she was not consulted. That is true."

Having approved the plea bargain between Diesen and DeFoe's defense attorney, District Judge Charles Barnes on April 30, 1980, stayed execution of a 90-day jail sentence and gave DeFoe 90 days' probation on the condition he complete alcohol treatment at Mash-Ka-Wisen Treatment Center in Saw-

See **Berglund** Page 4D

Berglund: 'I got my jaw broken because Melvin wasn't prosecuted the first time'

From Page 1D

yer.

DeFoe defied Barnes' sentence, according to court records. He showed up at the center three days late, then left on May 5, 1980, after less than a day – a probation violation. Typical treatment usually lasts from 28 to 35 days, according to Mash-Ka-Wisen Administrator Elwin Benton.

But DeFoe was not punished. When he appeared at a followup hearing before Barnes on May 22, 1980, the judge again released him on probation instead of invoking the original 90-day sentence. DeFoe was allowed to go to the Brainerd area to work.

"I think there are many people in the system and on the streets who feel Melvin DeFoe got off very lightly for the kinds of assaults he performed on Kathy and the property. I think I agree with that," Twomey said.

Staff photo by Jack Ferguson

Do battered women see justice done in the Carlton County Courthouse? Some say no.

He added: "I think it would be unfair to zero in on the county attorney's office for the fact (DeFoe) didn't do much time in jail." The sheriff also said DeFoe's probation agent had the responsibility to monitor him during his Mash-Ka-Wisen term.

Probation Agent Mark Zuber refused to comment on DeFoe's case.

• Berglund said Diesen refused to return her telephone calls; she said she called at least 10 times after the first assault. Diesen's secretaries screened all his calls. "I went down there and tried to see him but he wouldn't be there or he wouldn't see me. It's just a total, uncaring, leave-me-alone attitude."

Said Diesen: "I can't recall all the details. This may have taken place. It was a long time ago and I'm not in a position to deny that she may have called and wanted to talk to me. It's very possible."

• Shortly after the first assault, Diesen, via Sheriff Twomey, asked Berglund if she'd take a lie detector test. After consulting her attorney she refused.

"Just the request of the lie detector test was an insult to her," declared Bieter.

• On Sept. 2, 1980, Barnes signed an order that DeFoe be "honorably discharged" from probation. Just the day before, Berglund told deputies, DeFoe allegedly had attacked her again – causing her to break her jaw.

Two charges were issued against DeFoe in connection with the second incident: violation of a restraining order and fourth-degree assault, both misdemeanors. More than a year later, DeFoe still has not been brought to trial; Diesen said that Labor Day assault case is still pending.

"This is, by God, enough time!" said Dale Lucas, Duluth, Berglund's attorney after the second assault. "He's not pushing. How many women in this kind of position have the kind of stamina to put pressure on a

county attorney? Justice delayed, they say, is justice denied."

Diesen wouldn't explain why he didn't charge DeFoe with a felony in connection with the second assault. "Under the code of ethics, we're not supposed to discuss opinions of evidence pending before the court," he said.

About nine hours after what Berglund says was the second assault, two deputies had Berglund sign a statement that said, "I don't remember him (DeFoe) hitting me. It happened so fast." Berglund later said that statement did not reflect her memory of the assault and was taken while she was dazed and on medication.

"Once I wrote that, I couldn't take it back. I couldn't change it. I couldn't do anything. I could have written something like 'Mary had a little lamb' on that paper because afterward I didn't even know what I had written," she said.

Berglund said the statement profoundly hurt her case. Diesen later said the statement was one main reason he decided against a felony charge for the alleged Labor Day assault. In a letter to Twomey Sept. 4, 1980, Diesen wrote, "Although her injuries are substantial, her statements do not indicate that they were inflicted by Melvin. Her version does not rule out an accidental cause for such injuries."

Berglund and DeFoe were mates for almost 10 years and once lived at 1624 Jokela Road in rural St. Louis County. In September 1978 Berglund left him, bought her own home at 1910 Big Lake Road in rural Cloquet and two months later started a civil separation action against him. On June 24, 1981, she married bricklayer Frank Leimer, 36, and they're living in her home with her three children, ages 12, 10 and 6; and his two children, ages 14 and 10.

DECEMBER 7, 1979

The night of Dec. 7, 1979, Berglund had been out to supper with a Cloquet man. They returned to her house about 11:00 p.m. and she went into the bathroom.

"I heard a familiar truck pulling up," Berglund remembered, "I knew the sound of the truck, that it was Melvin DeFoe coming into my yard. He just burst in the door . . . my own home." She heard a brief scuffle; her friend left.

DeFoe kicked his way into the bathroom, she said. "I remember that door just – Bam! – and it sprang open."

"He just came right over across the bathroom and just started whaling, hitting me in the face mostly, with his fists," Berglund said. "He just didn't stop."

Sheriff's department reports confirmed Berglund's story.

After the beating, Berglund told police, DeFoe tore through her home, ripping a phone off the kitchen wall, yanking drawers and scattering silverware, crushing her spare eyeglasses, breaking kettles, smashing a color TV

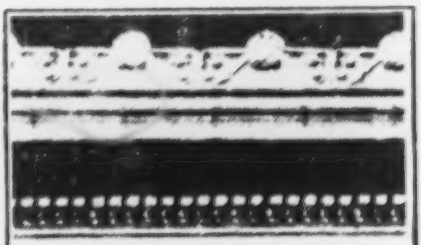
set and stereo and denting a table. Twomey estimated the damage at well over $300, the legal bottom limit for charging a felony.

At one point, DeFoe went into the bathroom and Berglund sneaked into her bedroom to call the police, she said. "I didn't dare talk above a whisper."

DeFoe emerged from the bathroom, his fury undiminished. The pullout couch in the living room was open and he threw her down on it.

Then DeFoe pulled out a pocketknife and traced the blade across her throat, just deep enough to leave a mark, Berglund said.

When deputies arrived, they found the knife in DeFoe's pocket. One officer talked to Berglund's son, Todd, who'd witnessed the knife attack. Then the officers took DeFoe away to St. Louis County Jail; Carlton County had no jail then.



'I recall there was a serious gap as to how these injuries were inflicted. She can't remember specifically him inflicting them. Things happened so fast. That's a pretty serious factor, when it's a burden of proof beyond a reasonable doubt.'

Donald Diesen

DeFoe's attorney Harry Newby Jr. of Cloquet, said his client conceded he went "berserk" the night of Dec. 7 when he came into Berglund's home and allegedly found her in a sex act with her boyfriend while Todd watched from down the hall.

Declared Berglund's attorney Bieter: "My client flatly, absolutely denied that."

Newby reportedly told Diesen about Melvin's accusation and Diesen called Twomey, telling him to ask Berglund if she'd take a lie detector test. Bieter advised her not to.

"It's not right that I should take a lie detector test because I'm the victim," Berglund asserted. "Diesen held that very against me."

On Feb. 8, 1980, Twomey interviewed Berglund while a court reporter took notes. According to a transcript of the conversation, the sheriff told Berglund, "Mr. Diesen indicated to me yesterday that it was his impression that because you did not take a polygraph test that Judge Barnes would be inclined to accept and believe Melvin's version of what happened that night." Berglund then said she'd be willing to take the test to influence DeFoe's sentencing.

"They never mentioned it again," she said.

Diesen said his felony-reduction decision was only slightly influenced by Berglund's refusal to take a polygraph. "I did not pressure her or urge her in any way."

Bieter said: "I think Diesen took the lie detector thing as an opportunity to plea bargain, get rid of the case and avoid a jury trial."

Said Diesen of his test request: "It takes place a number of times, especially when there may be a basic one-on-one dispute as to what happened."

DEFOE IN COURT

Twomey and Diesen signed a criminal complaint against DeFoe on Dec. 10, 1979, citing three charges: second-degree assault (a felony) for the knife attack – maximum sentence of five years and a $5,000 fine; aggravated criminal damage to property (felony) – same maximum sentence; and fourth-degree assault (misdemeanor) for the fist blows to Berglund's face – maximum sentence of 90 days in jail and a $500 fine.

DeFoe sat in St. Louis County Jail from Dec. 7 through Dec. 14, when he posted at $10,000 bond and was released.

DeFoe appeared before District Judge Donald Odden Dec. 19, 1979. Newby requested an omnibus hearing; it was set for Jan. 9, 1980. DeFoe's bail was continued and he was released. An omnibus hearing is held to determine if there is sufficient evidence to try someone for an offense. Also, pre-trial motions are presented at the hearing.

On Jan. 9, the omnibus hearing was rescheduled for Jan. 30; DeFoe remained free on bail.

On Feb. 6, 1980, Diesen offered a plea bargain to DeFoe. The felony charges were dropped in return for a guilty plea to misdemeanor assault. Barnes then ordered a pre-sentence investigation.

On April 30, 1980, Barnes sentenced DeFoe to 90 days' probation, staying execution of a 90-day jail term. The main condition of that probation was that DeFoe enter in-patient treatment for alcohol problems at Mash-Ka-Wisen on May 1, 1980.

Court files show DeFoe didn't show up at Mash-Ka-Wisen until the afternoon of May 4, 1980. Then he left without permission – a probation violation – about midnight May 5, Chemical Dependency Counselor Walter D. Hardy reported the next day.

Barnes signed an arrest order May 7. Barnes denied DeFoe's request for bail that day and DeFoe was sent to jail to await sentencing.

St. Louis County Jail Administrator Bob Higby said his records show DeFoe was in jail from May 6 through May 22, 1980, while awaiting his probation violation hearing.

On May 22, Barnes released DeFoe from jail and renewed his 90 days' probation.

Zuber reported to Barnes that DeFoe was hostile, angry, disliked authority and seemed unwilling to reform his behavior, court files show.

Furthermore, in a May 13, 1980, letter to Barnes, John V. Farrell, counselor at Duluth's Center on Alcohol and Drug Problems, said, "It is the opinion of this counselor that Melvin L. DeFoe is in the early stages of alcoholism . . . It is evident to me that treatment will be necessary for his recovery; either at the present time or some time in the future."

But on Sept. 2, 1980, Barnes signed an order discharging DeFoe from probation.

WHY THE PLEA BARGAIN?

Why did Diesen opt for the plea bargain?

"That's not a very easy question to answer," Diesen said. "It was a very stormy, volatile situation. There was a civil action that was pending at the same time. There was a major consideration as far as a forum for adjusting damage to the property aspect. A great deal of emotions connected with it. The prospects of dragging at least one of their children in as a witness; a number of strong accusations and claims; discrepancies in facts. It was a conclusion reached after examining a lot of different factors."

Said Diesen: "The overall basic reason why I agree to that disposition would be that I felt, considering all of the aspects of it, that justice could be done in a sufficient remedy, or disposition made within the limits of a misdemeanor conviction; and therefore I agreed to it.

"I think my decision to reduce it to a misdemeanor in this DeFoe matter was a judgment call based on many different circumstances. I don't claim infallibility. As far as looking back on what was done, I'm not convinced it was a poor decision."

He continued: "What difference might there have been if we had gone to trial? I don't claim to know what difference there might have been."

Diesen said there were two other reasons why he dropped the felonies: Berglund's boyfriend, who witnessed the Dec. 7 assault, was in Alaska and unavailable for testimony; and calling Berglund's son Todd to court might have harmed him.

The assault aside, Diesen said he chose not to press a felony damage charge because state Supreme Court guidelines, touching the question of property damage claims between former spouses, say that disposition of family disputes often "is better left to the (civil) family court than to the criminal court." Also, civil routes are often quicker, Diesen said.

Summarizing his view of the Berglund-DeFoe case, Diesen said, "You have to consider the devastating effects (a trial) could have, to have the husband and wife in there in the public court, slamming away at each other with accusations, and have a small child caught in the middle: 'Which one of your parents it telling the truth?' The negative effects of dragging a domestic dispute into the courtroom are far more serious, I believe, than in a normal criminal complaint."

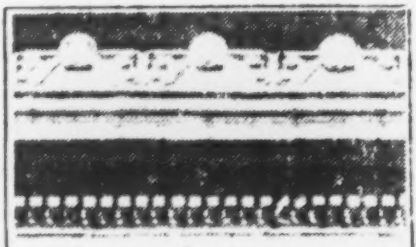
What does Barnes say about approving the plea bargain?

"Our hands are tied on those deals," the judge said. "They're all worked out. My view is simply this: If the prosecution thought they had a weak case . . . we normally do not look behind the plea bargains very far. I handled it just the way I've handle 400 others."

DeFoe's allegation that Berglund was in a sex act when he walked into her house is "a valid defense if you can get a jury to believe it," Barnes said. "Who in the community, of the two of them, is more likely to be received with warmth by a jury? That's always a judgment."

Barnes was asked whether it was proper to release DeFoe on another 90-day probation term after he violated his original probation May 5, 1980, by leaving Mash-Ka-Wisen.

"You do what you know, you think should be done," Barnes said. "We don't automatically put these guys in jail for a probation violation." The judge said DeFoe was released because he had "an assurance of employment."



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Kathy Berglund

SEPTEMBER 1, 1980

The story of what Berglund says was the second beating began on a holiday.

Berglund had had little contact with DeFoe in months, other than when he came to pick up the children for visitation. Then, she said, he'd take the kids and leave quickly. Berglund had been dating a Duluth man for several months that summer.

She and the man took the kids on an outing; then he returned to her home and napped on the couch. She went with her sister to a bar in rural Cloquet. Berglund said she had a few beers and "In came Melvin." They spoke briefly. Later, when she got home, some time between 11

and 11:30 p.m., she noticed DeFoe's truck parked in her driveway.

DeFoe yelled something at her and started after her around the truck.

She started running toward her house and was aware of DeFoe chasing her, she said. "He jumped at me, lunged at me, knocked me to the ground." She said DeFoe landed atop her and she struck her chin with great force on some rocks, breaking her jaw.

"I can remember hearing those rocks. I can hear these sounds in my head. I hear the rocks, my feet on the rocks, the small pea rocks, I can hear that. Then I just scrambled and ran for the house and I could feel that my jaw was loose, It felt like If I opened my mouth the bottom of my face would fall off."

DeFoe followed her as she half-crawled, half-ran into her house. He knocked her to the floor and kicked her while her boyfriend and children watched, she said.

The Carlton County Sheriff's Department investigative report said Berglund "did not remember or see Melvin hit her because everything happened so fast."

She recently explained she said that because she was still in shock from the beating and not thinking clearly. Three days after her jaw was broken she told Twomey she clearly recalled DeFoe leaving his truck and heading toward her before she was knocked to the ground.

"She remembers Melvin coming around the door of his truck and hollering something." Twomey's investigation report said. "She remembers Melvin following her into the living room and kicking her but she felt numb and couldn't feel the pain of the kicks." Twomey also talked to Todd, who confirmed what went on in the house.

In a letter to Twomey on Sept. 4, 1980, Diesen listed six reasons why he would not issue criminal charges in connection with the attack:

- Berglund didn't say who she went with to the bar that night, why her boyfriend stayed home, how long she was there and how much she drank.
- She didn't say who DeFoe was with at the bar, how long he was there or how much he drank.
- She didn't say what she and DeFoe talked about at the bar.
- She didn't say why she went straight home after talking to DeFoe.
- She did not say why DeFoe went to her home, why he'd strike her or take two of the children away with him.
- And "she cannot tell us of any conversation they had at the home, how he injured her or even if he got out of his truck."

Said Lucas: "This is ridiculous. They don't have to do with the actual crimes but are questions that should be brought out in the trial. He's putting himself not only in the job of the county attorney, but the job of a jury."

DIESEN'S DOUBTS

"It's one thing, a question of opinion," Diesen said. "It's also like I told you of the canon of talking about the merits of a case and opinion, and I'm just not free to comment or give opinions on the strengths or weaknesses of that evidence."

What about Berglund's injuries?

"I recall there was a serious gap as to how these injuries were inflicted," Diesen said. "She can't remember specifically him inflicting them. Things happened so fast. That's a pretty serious factor, when it's a burden of proof beyond a reasonable doubt."

After more than a year, why is this misdemeanor assault charge still pending in the courts?

"Simply because the defendant has not been brought in on a warrant," said Diesen's assistant, Art Albertson. However, Overlie said that DeFoe has been in court twice since the assault charge was filed.

And what about Berglund's claims that her rambling written statement was a product of shock and confusion and not her accurate memory of the assault, and that she said she now could make a clearer statement?

"This'll come back to haunt a person in a trial," Diesen said, "when confronted with the burden of proof beyond a reasonable doubt. This throws a cloud over the felony aspect of the charges."

Lucas said he "forced" a meeting with Diesen on Sept. 29, 1980. Present were Kathie Moore and LuAnn Dietrich (advocates from Duluth Women's Shelter) Berglund, Twomey and Lucas. Their purpose was to persuade Diesen to push a felony charge for the Labor Day assault.

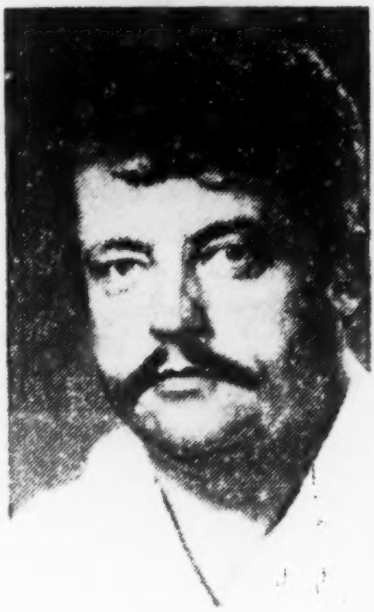
Lucas said Diesen clearly expressed his prosecution philosophy for men who batter women. "He said he was not going to be pushed into prosecuting domestic abuse cases unless there was serious bodily harm. I think what he's looking for is no possible defenses. That type of case he's talking about only comes along every 10 years. Meanwhile, what do you do with the women who are being harmed?

"Diesen said he would not charge the felony because Kathy did not see DeFoe strike her. I thought that was a fairly flimsy excuse. The jury should have decided it – not Don Diesen."

Lucas said Diesen finally agreed under pressure to press a misdemeanor assault against DeFoe for the Sept 1, 1980, incident.

'Yes, I agreed with (Kathy Berglund) and I still agree that she really probably did not have her day in court. The plea bargain was accepted and certainly she was not consulted.'

Sheriff Terry Twomey



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Judge Charles Barnes

Kathy Berglund

focus/editorial
Duluth News-Tribune

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County Attorney Donald Diesen

Critics say he's not tough on domestic abuse

Donald Diesen

BY JOHN HESSBURG

CARLTON – Critics of Carlton County Attorney Donald Diesen contend he's an obstacle to justice for battered women.

These critics include a number of attorneys and professional women's advocates from Carlton and St. Louis counties.

Critics charge Diesen has ineptly handled battered women's cases through callous treatment of victims, half-hearted prosecution of their complaints, a tendency to demand too much evidence and undue willingness to plea bargain felony assaults down to misdemeanors.

On the other hand, Diesen is seen by supporters – and even some hard-line opponents – as scrupulously honest, a soft-spoken gentleman, a man who works hard and is not controlled by any special interests. Diesen's backers say he's fair-minded and cares deeply about his work.

"I have a job to do, which I try to do as best I can," Diesen said. "I try to accomplish justice. I am proud of the people we have, the level of competency. I don't think I have any reason for any apology for the way our office is being conducted."

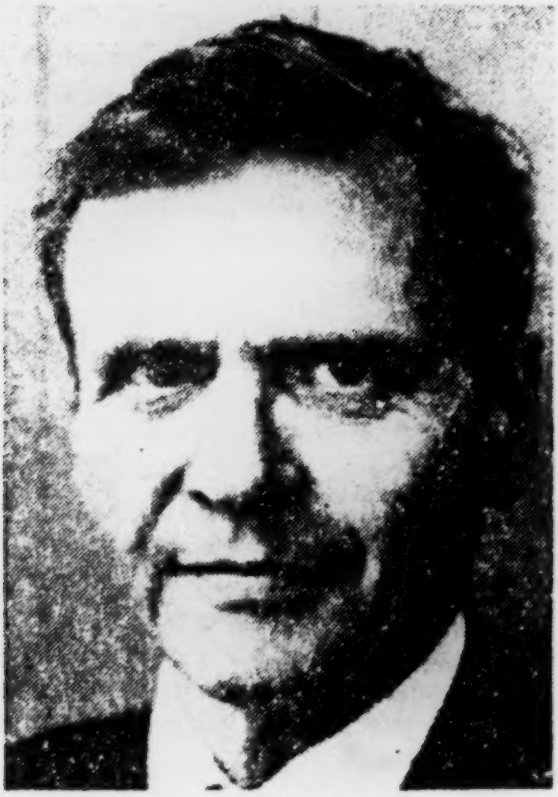
Some accusations of weak prosecution may stem from Diesen's large caseload in recent years, his supporters say. Diesen said that as of Jan. 23, 1981, he had 38 felony cases still pending from late 1980. That number dwindled to 24 on Feb. 12, 1981, to 18 on Feb. 25 and nine on May 13. Diesen has had one assistant, Art Albertson,

since Oct. 1, 1977. He hired a second, Scott Belfry, on July 20, 1981.

Among Diesen's loyalists are Carlton County Sheriff Terry Twomey, Cloquet Police Sgt. Dennis Randelin and some attorneys.

Cloquet attorney Dennis Korman said, "I have a lot of respect for Don Diesen." Along with his private practice, Korman prosecutes some misdemeanors for Cloquet. "I think Don Diesen does an excellent job," he said.

If there have been any rough edges on his record, his huge caseload may be at fault, Korman said. "Don Diesen, frankly, was overloaded. That office was just swamped. It's far more than a two-man office can handle."



Donald Diesen

Diesen, 54, has been Carlton County attorney since April 1, 1970. He faced opposition in 1970 and 1974, but ran unopposed in 1978.

Son of an attorney, Diesen had a private law practice in Cloquet from 1956 through 1970. The prosecutor and wife Patricia have seven children and live in Esko.

He's a trim man of medium height who smokes a lot but still appears fit. That may be because of his distance running. He said he's finished seven marathons, including three Grandma's, and has logged a personal best of 4 hours and 9 minutes.

He speaks softly and wears a hearing aid in each ear.

INSENSITIVE TO WOMEN?

"Female clients of mine have complained that he's not sensitive and that it's difficult for them to get access to the courts," said Fred Friedman, 34, Cloquet resident and Duluth attorney. Friedman has represented a number of Carlton County's battered women and has had frequent contact with Diesen.

Friedman said some of his women clients have said "the conversation, the interview between them is difficult. They found him impatient." One key to responsible prosecution, especially of battered women's cases, is a smooth interview that sets a woman at ease, Friedman said.

"Don Diesen lacks killer instinct," said Dennis Seitz, 42, rural Mahtowa resident and Cloquet attorney who specializes in domestic cases. Seitz also served as an assistant district attorney in Colorado from 1970 through 1974. "When he gets pressure he pushes a case. When there's not too much pressure, he doesn't seem to. In order to be a really good prosecutor, you've got to be able to go for the throat," Seitz said.

Said Diesen: "I guess I'm trying to accomplish justice in the matter and do what should be done based on the

facts and the points that I have presented to me. I don't consider myself unapproachable. In most cases, because of the volume of work going through, I don't have frequent contact with the women."

Attorney Dale Lucas of Duluth's West End Legal Aid said, "I think Don Diesen's attitude is remaining in the dark, the old times. Women in Carlton County who are being abused and battered are paying for his attitudes." Lucas has represented several of Carlton County's battered women who've

See **Diesen** Page 5d

Diesen

From Page 1d

complained of lax prosecution by Diesen.

"Diesen's philosophy is: You have a domestic quarrel – even if it leads to bloodshed – you settle it in the family." Lucas said. "Women in Carlton County who are being abused and battered are paying for (Diesen's) attitudes. He has to enforce the law. And the law is it's a crime to commit domestic violence."

Said Diesen: "I think that my philosophy is the same as the people in general. Violence is a serious matter and jail is an appropriate response for people who do violence, whether violence in the family or violence in general. A factor that a prosecutor should take into account is shielding a victim from humiliation, a court trial if possible . . . and spare a family and victim the trauma of sitting there in the courtroom and slinging away."

Twomey said he's asked Diesen about his philosophy on prosecuting domestic assaults. "The county attorney feels that he does not condone wife beating or wife beaters. His general philosophy is that they be charged . . . and that he recommends some local jail time to the sentencing judge. He may not be satisfying what the Women's Coalition or the battered women, what they

perceive as justice . . . however, I'm not sure the criminal justice system is capable of satisfying "them" because it is, by nature, a "slow, prodding process."

Declared Twomey: "I don't think the criminal justice system – period – serves the needs of battered women."

Diesen cares about battered women's dilemmas, Twomey said, "but he's concerned in a very technical way. He definitely wants a lot of evidence; there's no question about that."

ENFORCING THE LAW

Diesen "is absolutely not enforcing that statute – the Domestic Abuse Act," Lucas said. "I think he is not aggressive enough in prosecution. He's too afraid of losing cases and therefore doesn't bring as many to trial as he should. I think he's got a very old-fashioned attitude about women . . . that criminal law has no place in domestic matters.

"He's clearly saying, 'Don't bother me with them. You take care of them at home.' He has to enforce the law. And that law is it's a crime to commit domestic violence."

Minnesota Supreme Court guidelines are a big factor in his cautious approach to battered women's cases, Diesen said. These guidelines say a prosecutor should be careful not to damage a family, and often there are civil alternatives to criminal charges for a battering.

"That's a fundamental question in a lot of cases," Diesen said "whether to bring a matter to a jury or not. I'm not claiming infallibility. It's a constant learning process. I'm open to suggestions.

Said attorney Thomas Bieter: "I've concluded that Don Diesen does not like to handle domestic relations cases – period." Bieter, a former assistant St. Louis County attorney for 2½ years and public defender from 1972 through 1975, is attorney for Duluth's Women's

Coalition, an advocacy group that's counseled and sheltered many battered women from Carlton County. Bieter also represents the Cloquet Women's Shelter.

"In crimes of violence the county attorney's office . . . should be very vigorous and firm in the prosecution of the case, and they should not be very lenient as far as plea bargaining is concerned," Bieter said. "And secondly, the same policy that applies to violence visited by stranger upon stranger should also apply to the domestic situation."

"A lenient policy is really a condoning of violence. A vigorous policy, on the other hand – I'm absolutely sure that it has a deterrent effect, especially in a divorce situation or a battered woman situation. Judging from (Kathy Berglund's) case, in my opinion, (Diesen) is far too lenient and improper. Timid is a good word – I say that based on this case. He should have a much more vigorous policy in prosecuting crimes of violence, especially the violence (against) the battered woman."

LuAnn Dietrich, advocate for battered women at the Duluth Women's Shelter, has counseled about 20 Carlton County women who've suffered serious beatings in the last two years. Dietrich has met with Diesen at length about one of those clients – Berglund.

Diesen "is not going to prosecute unless the woman is on her deathbed," Dietrich declared.

Kathie Moore, another Women's Shelter advocate who's had close dealings with Diesen and battered women from Carlton County, said, "I know he's not doing his job with battered women. Women don't count (to him), particularly if they're married women. It's putting women back a hundred years into second-class citizenship again. A man like that does not belong in the public system."

Moore works with the Duluth's Women's Shelter, which provides a safe house, counseling an advocacy services to raped and battered women. She's had a

DIESEN'S STYLE

Several attorneys offered opinions on Diesen's professional demeanor, which may reflect on what some perceive as his reluctance to prosecute battered women's cases.

Said attorney Marvin Ketola: "He (Diesen) isn't aggressive; there's no question about that. I've been on both sides of this system." Ketola, a former state representative, is a Carlton County public defender who works with people charged with misdemeanors. He also prosecuted misdemeanors for Cloquet from 1972 through 1976.

"I've heard from law enforcement individuals that they're somewhat disenfranchised" by Diesen's lack of prosecution toughness, Ketola said. However, Ketola noted, police have an interest in seeing arrested people go to jail.

"I have a good relationship with the officers," Diesen maintained.

In 1979 and early 1980 there were some battered women's cases that county deputies said should have been charged as felonies but were made misdemeanors, Twomey said. "My field officers expressed to me a feeling of disappointment and disillusionment; and I guess I shared it in some cases.

"However, I want to make it extremely clear that in the past year I am completely satisfied with the prosecution vigor out of the county attorney's office. It's been an excellent year, an outstanding year."

"The fact that Don doesn't pound the table or scream doesn't mean he's not a good prosecutor," said Robert

Lucas. "Trying a lawsuit is not being a defensive halfback."

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'The county attorney feels that he does not condone wife beating or wife beaters. His general philosophy is that they be charged . . . and that he recommends some local jail time to the sentencing judge. He may not be satisfying what the Women's Coalition or the battered women, what they perceive as justice . . . however, I'm not sure the criminal justice system is capable of satisfying them.'

Sheriff Terry Twomey

number of clients form Carlton County, who she says have been bitterly dissatisfied with Diesen.

"Having been personally involved with the women whose lives he's affected, I have to say that he is an active detriment in his office. It appears his ego is at stake every time somebody comes in there to make a complaint. And unless it's a shut-tight case where he has every chance of coming out – hey, the hero! – then forget it; he doesn't want to mess around with it."

Diesen rejected charges that he shies away from aggressive prosecution of men who batter women. "Well, I deny that; that's not the case. I process those and any kind of cases in the same manner as other criminal offenses."

Friedman said of Diesen: "There's nothing strong about his won-lost record. There's nothing there to defend."

Moore said, "I think he (Diesen) has got a real ego involvement there, that every case he takes he wants to be a winner. With battered women you don't always have winners."

PLEA BARGAINS

Some of Diesen's detractors say battered women never will be winners in Carlton County as long as Diesen keeps arranging plea bargains in serious assault cases.

"I have more success cutting a deal out there (Carlton County) than I do here" in St. Louis County, Friedman said. "The people out there don't want to go to trial. I've had all sorts of last-minute deals."

Responded Diesen: "That sounds pretty incredible. That's a very surprising statement. In the criminal justice system, most cases are disposed of before trial. A prosecutor is not supposed to charge something that you have no reasonable expectations that you could prove."

Friedman continued: "In my opinion (Diesen) is aggressive in charging cases out. But he charges a lot of crap that never goes anywhere. Once you make a decision to charge something out then you go with it. Don't change felonies if you're going to plea-bargain them out in six weeks."

Diesen opts for plea bargains "not only too easily, too early and easier than other prosecutors," Friedman said.

"Don isn't the greatest trial lawyer in the world, but he's a very bright fellow," said Robert E. Lucas, 48, a Duluth attorney. "I've always found Don to be a fair-minded guy. He's not been a pushover. I think Don Diesen is a competent prosecutor. He is a sound lawyer and a concerned person, a good and wholesome person. I have respect for Don Diesen."

Several courthouse observers from Duluth and Carlton County, including some Diesen backers, say he's not a dynamic courtroom lawyer, which may reflect on his reluctance to charge felonies for domestic assault. Part of Diesen's problem may be his hearing impairment, one man says.

"Put yourself in Don's place. How do you argue in the courtroom when you only hear half of the conversation?" said Randelin. "He has a terrible hearing problem. Don reads lips. In a courtroom defense attorneys . . . they intentionally turn their backs on Don. They intentionally stand up and step ahead of him so he can't hear."

Diesen insisted his hearing problem doesn't prevent effective prosecution. "The primary thing is that the job be done," Diesen declared. "The job is being done."

Diesen "gives no leadership or direction," said Seitz, a Cloquet attorney who specializes in domestic cases. "He's a nice, quiet gentleman but he doesn't run an active office. I don't see him active in felonies, certainly not in terms of providing direction."